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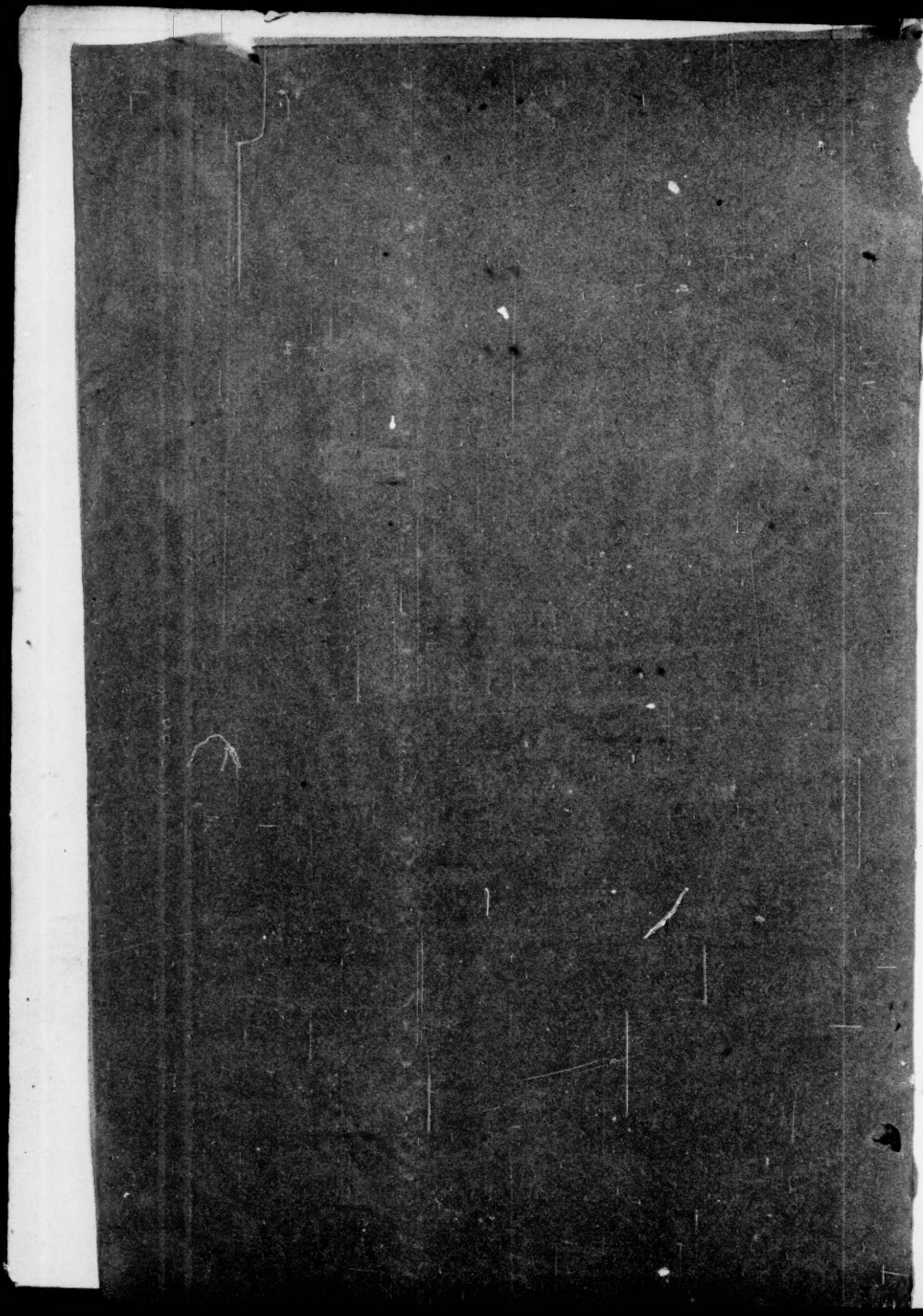

SUPREME COURT OF THE UNITED STATES

No. 798.

THE UNITED STATES, APPELLANTS,

vs.

JOSEPH SMITH.

APPEAL FROM THE COURT OF CLAIMS.

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1 United States Court of Claims.

JOSEPH SMITH
vs.
THE UNITED STATES. } No. 10404. Filed June 19, 1875. A. H.

To the honorable the justices of the said court:

The petition of Joseph Smith respectfully showeth—

1. On the 25th day of August, A. D. 1873, a contract was made between the United States and your petitioner, whereby he bound himself to superintend, or cause to be superintended, and assist the soldiers in the erection of, buildings at the post of Beaver, according to plans and specifications, and to supply or cause to be supplied all the skilled labor and material necessary for the erection of the buildings in accordance with the said plans and specifications, and in consideration thereof the United States promised to pay your petitioner therefor the sum of $69,177, in three or four installments, as the work progressed, less, however, twenty per centum of each installment, which was to be reserved until the completion of the work. Thereafter, on the 25th day of October, A. D. 1873, the United States presented to your petitioner for execution a written agreement, embodying the above-recited contract, but modifying the times of payment as therein provided for. Your petitioner, having then made large progress in and having incurred great liabilities on account of the work, was forced to execute the said agreement or put his whole venture in jeopardy. A copy of the said agreement is hereto annexed.

2 2. Your petitioner duly performed his part of the said contract to the satisfaction of the United States, which accepted the buildings and paid your petitioner the said sum of money. Your petitioner did not accept this money in satisfaction of his demands against the United States in the premises, but has always claimed other and further sums of money from the United States for breaches by them of the said contract and agreement, and for extra work done by your petitioner in connection therewith.

3. The refusal of the United States to pay the contract price in installments, as they originally contracted to do, very much injured your petitioner's credit, (who had never counted upon executing his contract on his own resources alone,) and by the difficulties it created in his getting labor and materials caused him damage to the amount of one thousand dollars.

4. About the end of November, A. D. 1873, the United States caused all work on the said buildings to cease, and for about three months prevented your petitioner from going on with the same. All this was done against the protest and remonstrances of your petitioner. The work was so stopped by the United States when two weeks of additional work would have put the buildings in fit condition to stand the winter. At that time the work was in full progress; the skilled laborers, who in that country (Utah Territory) are scarce and difficult to be gotten, were present and engaged on the buildings, and a large amount of material had been collected by your petitioner. This conduct of the United States was in breach of their said contract and agreement, and caused your petitioner great damage. In settling, as he was thereby forced to do, contracts he had made with various persons in respect of the work, he was damaged ($500) five hundred dollars. In repairing damage to the buildings by exposure to the weather during the cessation of the work, and in replacing material then destroyed, your petitioner ex-

pended ($1,500) fifteen hundred dollars. By the said act of the
3 United States your petitioner lost 1,200 bushels of lime, slacked and run off for the work in two pits when it was stopped, and worth ($780) seven hundred and eighty dollars; also 10,000 feet of lumber intended for the buildings, which lumber was lost or so damaged as to be useless, and was worth ($500) five hundred dollars; also 20,000 laths intended for the buildings, which laths were so damaged as to be useless, and were worth ($200) two hundred dollars. The wood-work already done was so much affected by exposure to the weather during the said period that your petitioner was forced to expend in extra labor and material in painting it ($250) two hundred and fifty dollars. Your petitioner was also compelled by the said delay to pay ($200) two hundred dollars more than he otherwise would have had to for 100,000 shingles used on the buildings, and thereby also lost ($200) two hundred dollars in glass, paint, and hardware. Your petitioner is also entitled to receive from the United States, by way of damages in respect of their said breach of contract, the sum of three thousand seven hundred and forty-four dollars, being the wages and maintenance of twelve workmen, some of whom were skilled mechanics, for seventy-eight days, during which the work was stopped as aforesaid. In removing snows and protecting the buildings during that period he expended an additional sum of five hundred dollars.

5. Your petitioner further shows that he did extra work on the said buildings by making a cellar 100 feet long, instead of 40 feet long, as had been agreed upon, which extra work he expended ($600) six hundred dollars upon. On the hospital he did extra work worth ($400) four hundred dollars. The United States got the benefit of all this extra work, and knew of it, and of the material applied by your petitioner in time to stop the same without injury to themselves, and knew of the said intended change, and did not object, but received and held the benefit of the said extra work and material.

4 6. The said buildings were completed and offered for inspection to the United States on the 25th day of May, A. D. 1874, and they had been duly inspected and accepted on the 21st day of June, A. D. 1874; but the United States, in breach of their contract, did not pay the contract price until the 30th July, 1874, by which delay your petitioner suffered damage two hundred and fifty-six dollars and forty-seven cents.

7. By reason of the premises, your petitioner, so far from making any profit by his said contract, has been already loser thereby, having paid out or incurred liability in respect of his contract for more than the contract price, and having received no compensation for his time nor skill.

Your petitioner is a citizen of the United States, domiciled in the Territory of Utah; has at all times borne true allegiance to the Government of the United States; has not aided, abetted, or given encouragement to rebellion against the said Government, and has never commenced any suit or process in any other court against any person whomsoever in respect to the premises. There has been no action thereon by Congress nor by any Department, and no other person is interested in the said claim.

Your petitioner prays judgment against the United States for his said damages in the sum of ten thousand six hundred and thirty dollars and forty-seven cents.

JOSEPH SMITH,
JAMES LOWNDES,
For Petitioner.

TERRITORY OF UTAH,
County of Beaver:

Personally appeared before me Joseph Smith, the above-named petitioner, who, being duly sworn, says that no assignment nor transfer of said claim, nor of any part thereof, nor of any interest therein, has been made; and that he is justly entitled to the amount in the foregoing
5 petition claimed from the United States, after allowing all just credits and offsets; and that he believes the facts stated in the said petition to be true.

JOSEPH SMITH.

Subscribed and sworn to before me, the undersigned, clerk of the district court within and for the *the* second judicial district of Utah Territory, at Beaver City, June 10, 1875.

JAMES R. WILKINS,
Clerk 2d Judicial District Court of Utah Territory.

Post-office address of Joseph Smith: Beaver City, Utah.
Post-office address of James Lowndes, attorney: 1420 F street, Washington, D. C.

Copy of contract.

Articles of agreement made and entered into this twenty-fifth day of October, anno Domini one thousand eight hundred and seventy-three, between 1st Lieut. S. Craig, 8th U. S. Infantry, A. A. Q. M. U. S. Army, of the first part, and Joseph Smith, of Beaver City, Utah, of the second part:

This agreement witnesseth: That the said 1st Lieut. S. Craig, 8th Infantry, A. A. Q. M., for and on behalf of the United States of America, and the said Joseph Smith, for himself, his heirs, executors, and administrators, have covenanted and agreed, and by these presents do mutally covenant and agree, to and with each other, as follows, viz:

First. That the said Joseph Smith, his heirs, executors, and administrators, agrees to superintend or cause to be superintended and assist the soldiers in the erection of buildings at post of Beaver, Utah, according to plans and specifications, and agrees also to supply or cause to be supplied all the skilled labor and material necessary for the erection of the buildings in conformity with said plans and specifications.

Second. It is agreed that for and in consideration of the faithful fulfillment of the above stipulations in all their parts, the party of the second part shall be paid by the United States, at the office of the A. A. Q. M., at post of Beaver, Utah, as follows, viz:

Sixty-nine thousand one hundred and seventy-seven dollars,
6 ($69,177,) provided that the United States is not liable for any amount beyond the sums appropriated for such purpose during the fiscal years in which the services are rendered. Payment to be made in installments at completion of each separate building, or as soon thereafter as funds may be received for that purpose. The buildings to be inspected and accepted by the United States.

Third. It is further agreed and expressly conditioned that no member of Congress is or shall be admitted to any share or part of this agreement, or to any benefit arising therefrom; that it is not transferable; that any sale, transfer, or assignment, (except under a process of law,) shall and will be considered as an abandonment of it; and the said party of the second part, his securities, be held responsible for all loss, delay,

or damage to the United States which may arise from such abandonment.

In witness whereof the undersigned have hereunto placed their hands and seals, the day and date first above written.

S. CRAIG, [L. S.]
1st Lieut. 8th Inft., A. A. Q. M.
JOSEPH SMITH, [L. S.]
Contractor.

Witnesses:
RICHARD SCOTT.
HENRY KIRK.
WILLIAM GIRL.
ENOCH CUNNINGHAM.

7 In the Court of Claims of the United States, December term, A. D. 1874.

JOSEPH SMITH
vs.
THE UNITED STATES. } No. 10404.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of ten thousand six hundred and thirty dollars and forty-seven cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

Filed June 26, 1876. J. R.

8 In the Court of Claims.

JOSEPH SMITH
vs.
THE UNITED STATES. } 10404.

At a Court of Claims, held at the Capitol in the city of Washington the first day of May, A. D. 1876, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Joseph Smith, claimant, do have and recover of and from the United States the sum of five thousand dollars, ($5,000.00.)

By the court:

A true copy of record.

9 In the Court of Claims of the United States, Dec. term,

JOSEPH SMITH
vs.
THE UNITED STATES. } No. 10404.

From the judgment rendered in the above-entitled cause on the first of May, 1876, in favor of claimant, the defendants, by their Attorney-General, on the 18th day of July, 1876, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Asst. Attorney-General.

Filed July 20, 1876.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

10 Court of Claims.

JOSEPH SMITH
vs.
THE UNITED STATES. } No. 10404.

Findings of fact.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. In May, 1873, the chief quartermaster of the Department of the Platte advertised for proposals for constructing certain buildings at the military post of Beaver, in the Territory of Utah. On the 24th June, 1873, the claimant sent in proposals, which were accepted by the order of the Secretary of War on the 23d August, 1873. Notice of acceptance was given to the contractor, who immediately proceeded with the work; but the agreement of the parties was subsequently reduced to the formal written contract annexed to the petition in this case.

II. On the 1st December, 1873, while the buildings were in progress of construction, the contractor was stopped by order of the post-commander, with the approval of the commander of the department, and all work under the contract was ordered to be suspended. The contractor objected to the work being stopped, and requested that he be released from his agreement, unless the work could go on. The matter was referred to the Quartermaster-General, and by him submitted to the Secretary of War. Pursuant to orders of the latter, the contractor was allowed to resume work. The period of suspension was from the 1st December, 1873, to the 3d February, 1874. The defendants have paid for the work done under the contract, but have not paid the damages occasioned by the suspension of the work.

III. On the 30th October, 1874, General Ord, commanding the Department of the Platte, referred the contractor's claim for damages caused by the suspension to the quartermaster of the post of Beaver, who had had entire charge of the work from the beginning to the completion thereof, with instructions to report as to the damages caused by "the unexpected stoppages and delays inflicted on the contractor, Smith, by the orders from Washington and department headquarters, the exposed and unfinished condition in which he was compelled to leave the buildings during winter storms, the remoteness of the place of building,

where all skilled labor had to be provided from a great distance, and which was left sometimes unoccupied and unpaid for on the contractor's hands; the deterioration in value of material left exposed while waiting for orders to continue the work." The post quartermaster, under these instructions, reported the contractor's losses at $8,000, and the department commander approved the recommendation. The court finds the claimant's damages for the same to be $5,000.

IV. During the progress of the work the contractor furnished and performed certain additional or extra work not required by his contract. But on the inspection of the buildings before the final payment it was found by the inspecting-officer that the contractor had omitted to furnish and perform certain work required by the contract. It was subsequently agreed between the contractor and the defendant's officers that the extra work furnished should be received and stand in the
11 place of that omitted by the contractor, and under and in pursuance of such agreement or compromise the contractor was paid the balance remaining due of the contract-price.

And upon the foregoing findings of fact the Court of Claims decide as—

Conclusions of law.

1. The officers of the Government charged with the care and supervision of the building to be erected by the claimant had no right to hinder or delay him in the proper performance of his work; and for the suspension thereof, ordered by such officers in the supposed interest of the Government, the claimant should recover such damages as were the necessary consequence of the suspension; that is to say, such damages as would place him as nearly as possible in the same condition as he would have been in if he had been allowed to proceed without such interference, excluding therefrom, nevertheless, any loss or injury to his materials which might have been prevented by the exercise of reasonable care and prudence on his part in the storing, custody, and preservation thereof.

2. The estimate or allowance of damages for the suspension of the work made by the post quartermaster, under the instructions of the commanding officer of the department, does not determine the amount thereof, and should be excluded by the court in making a computation of damages.

3. The extra work on the buildings done by the claimant in addition to that required by the terms of his contract, and the deficiencies under the contract, as determined by the inspecting officer who inspected the work before acceptance by the Government, as provided by the contract, were proper subjects of compromise and set-off, and having been so compromised and set off against each other before final payment, the claimant is concluded from seeking a recovery for the former.

NOTT, J., delivered the opinion of the court:

The Supreme Court decided in William Clark's Case (7 C. Clark, p. 24) that the officers of the Government have no right to hinder or interfere with a contractor in the prosecution of his work, even though he be in default and is seeking to perform after the expiration of the time fixed by his contract.

In the Amoskeag Company's Case (9 id., 50) it was held that where the officers of the Government request alterations in contract-work which will involve delay, the Government is responsible for the natural consequences of the delay. In Garrison's Case the Supreme Court likewise held that a subsequent alteration, indorsed upon the contract at

the instance of the contracting officer, was to be taken as an alteration made for the benefit of, and to be most strongly construed, if in doubtful terms, against the Government. (7 id., 78.)

In the case now before the court, the officers of the Government, for its supposed convenience or benefit, not only hindered the contractor but absolutely suspended his work. The suspension was not authorized by the agreement, and was to all intents and purposes an alteration sought by the Government for its own purposes, and for which it is properly and legally liable.

In estimating the damages caused by this suspension of the work, both parties have gone, to a greater or less extent, upon the actual expenditures of the contractor to his sub-contractors and workmen. We
12 do not understand this to be the rule for measuring the damages in such cases. The Government is a stranger to the subcontractors and workmen, and is not interested in the amounts paid to them. If the contractor had paid to them three or four times as much as the necessities of his case required, the Government would not be liable for such excess; and if they had waived all claims upon the contractor or compounded with him for a nominal consideration, his good fortune would not have enabled the Government to throw off its own liabilities. The instructions which should be given to a jury in such a case, we apprehend, would be not to inquire into the private or ex-parte transactions of this contractor, but to estimate the natural and inevitable losses caused to any contractor by such a suspension on such a building, taking into consideration the condition of the work, the magnitude of the contract, the cost of labor and material, the remoteness of the situation, and any other element of loss which would affect any other party interfered with in like circumstances. A contractor in such a case is not bound to make out a bill of particulars, and if he were able to make out one (which in such a case he never is) it would not follow that he should recover the full amount thereof. A jury must take into consideration all the facts and circumstances of a case, and while excluding losses due to the negligence of the contractor, allow to him such damages as, with reasonable diligence and prudence on his part, would put him in the same situation at the end of the work that he would have been in if he had not been interfered with. On the one hand, the defendant in such a case is not required to pay more for the suspension which he has requested than it is reasonably worth; on the other, he is bound to make the contractor whole.

The contract here was for about $70,000 worth of work; and the cost of the buildings, taking into the account the work which was to have been contributed by the Government, could not have been far from $75,000. It is manifest that the unexpected and total suspension of work upon such buildings in a remote place, where skilled labor was not to be had, and where the rate of wages and materials was very high, must have entailed on the contractor serious loss. Taking into consideration all the elements and circumstances of the case, we think the damages caused to the contractor must have been at least $5,000.

The judgment of the court is that the claimant recover of the defendant the sum of $5,000.

RICHARDSON, J., was absent and took no part in the decision.

13 In the Court of Claims.

JOSEPH SMITH
vs.
THE UNITED STATES. } No. 10404.

The claimant now comes and prays the court to find the following additional facts:

I. That the defendant, through its officers, among whom was an officer of the Quartermaster's Department charged with the supervision of the work, saw and knew of the extra work alleged in the petition to have been done by the claimant, in time to object to and to stop it, but that the said officers did not do so, but received and accepted the benefit of it for the defendant.

14 Upon the foregoing request the court makes the following order, to wit:

Refused as irrelevant and immaterial.

II. The terms of the agreement found to have been made between the claimant and the defendant's officers in respect of such extra work, particularly the items of the extra work embraced in such agreement.

Upon the foregoing request the court makes the following order, to wit:

Refused as immaterial, except as stated in the 4th findings of the court.

III. That the extra work alleged in the petition was done by the claimant and was of the value alleged, and is not expressly men-

15 tioned in the said agreement, and was of greater value than the work said to have been omitted by claimant.

Upon the foregoing request the court makes the following order, to wit:

Refused as irrelevant and immaterial.

IV. That the said agreement was made after the said extra work had been executed; and the claimant will ever pray, &c.

Upon the foregoing request the court makes the following order, to wit:

Allowed.

JAMES LOWNDES,
Claimant's Atty.

Filed April 15, 1876.

16 Court of Claims.

JOSEPH SMITH
vs.
THE UNITED STATES. } No. 10404.

Additional findings of fact requested by defendant.

The court is respectfully requested to find the following additional facts, the same to follow (in their order here written) finding III of the facts already found by the court. In the first one filling up the blanks with the amounts specially found.

That of the $5,000.00 damages suffered by the claimant, $ re-

17 sulted from the damage done to the building through work being exposed in an unfinished condition to the winter storms; $ from the retention of the skilled labor which had to be provided from a great distance, and which was left sometimes unoccupied and

unpaid for on the contractor's hands; and $ from the deterioration in value of material left exposed while waiting for orders to continue work.

Upon the foregoing request the court makes the following order, to wit:

Refused as immaterial under the conclusions of law.

II. That it nowhere appears in the evidence what amount of damage was done to the buildings proper, by reason of their being ex-
18 posed in an unfinished condition to the winter storms.

Upon the foregoing request the court makes the following order, to wit:

Refused as not included in the damages awarded by the court.

III. That it nowhere appears in the evidence what amount claimant paid, or what expense he incurred for the skilled labor which was left sometimes unoccupied and unpaid for on the contractor's hands during the period of the said suspension.

Upon the foregoing request the court makes the following order, to wit:

Refused as immaterial under the conclusions of law.

19 IV. That during all the time of the period of suspension, to wit, from the 1st day of December, 1873, to the 3rd of February, 1874, the claimant, by himself or his agents, had control, at least shared equally with the defendant in the control of the buildings and the material in question. That in no way was he during said period impeded or hindered by the defendant or its agents in exercising such care and management, both of the buildings and material, as to him (claimant) seemed meet and proper.

Upon the foregoing request the court makes the following order, to wit:

Allowed.

V. That the material was of such a nature as would only de-
20 teriorate in value or suffer damage throughout the period of suspension, from the want of proper care and the lack of using the proper means for its preservation.

Upon the foregoing request the court makes the following order, to wit:

Refused as not sustained by the evidence.

THOMAS SIMONS,
Ass't Attorney-General.

Filed April 15, 1876.

21 In the Court of Claims.

JOSEPH SMITH
vs.
THE UNITED STATES. } No. 10404.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the Attorney-General for defendants for the allowance of an appeal, as filed in the clerk's office July 20, 1876, and of the order of the chief-justice of said court allowing the same; of the findings of fact by the court and conclusions of law thereon; of the opinion of the court;

of the requests of claimant and defendants for additional findings of fact, and the rulings of the court thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this ninth day of October, A. D. 1876.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 798. The United States, appellants, vs. Joseph Smith. Court of Claims. Filed 12th October, 1876.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES
vs.
JOSEPH SMITH. } No. 798.

APPEAL FROM THE COURT OF CLAIMS.

Argument for United States.—(Submitted under Rule XX.)

See p. 35, for distinction between this case & Masterton v. Mayor.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES
vs.
JOSEPH SMITH. } No. 798.

APPEAL FROM THE COURT OF CLAIMS.

ARGUMENT FOR UNITED STATES.—(SUBMITTED UNDER RULE XX.)

Though this is a case attracting no public attention, and involving an amount in itself small, compared with those that generally are affected by the determinations of this court, yet its importance as forming a precedent to regulate the action of the Court of Claims in awarding damages cannot be overestimated. If right in the legal propositions herein elaborated, we shall ultimately save millions to the Treasury through the agency of this $5,000 case. The principle to be settled is one frequently, almost constantly, arising in the Court of Claims; and is, substantially, whether or not, in suits against the Government, as against individuals, a claimant must prove that he has been damnified, and to what amount; or whether, upon mere proof of a breach of contract,

Mason's case, 14 Ct. of Clms, 500-1, affords another illustration of the exercise of the assumed power to give damages without proof. 'Tis there said, if the gov't don't owe so much as the petr. claims, the Att'y Gen'l must show how much is due !!!

(assuming such breach to be here proved, if you please,) that court can assume a damnification, as a necessary consequence, and proceed to determine the amount of it, not upon specific proof, but *a priori*.

Sincerely believing that the Court of Claims—for which tribunal, representing the conscience of the nation, the highest respect is entertained—has in this instance fallen into an error, the gravity of which (if it be one) cannot well be overrated, I reluctantly trouble this court with an argument, the length of which can only be extenuated by the practical importance of the subject it discusses, and by the fact that it is produced, as the result of no little labor and thought, from a profound sense of professional and official duty to the Government.

STATEMENT OF THE CASE.

The Court of Claims found these to be the facts:

"I. In May, 1873, the chief quartermaster of the Department of the Platte advertised for proposals for constructing certain buildings at the military post of Beaver, in the Territory of Utah. On the 24th June, 1873, the claimant sent in proposals, which were accepted by the order of the Secretary of War on the 22d August, 1873. Notice of acceptance was given to the contractor, who immediately proceeded with the work; but the agreement of the parties was subsequently reduced to the formal written contract annexed to the petition in this case.

"II. On the 1st December, 1873, while the buildings were in progress of construction, the contractor was stopped by order of the post-commander, with the approval of the commander of the department, and all

work under the contract was ordered to be suspended. The contractor objected to the work being stopped, and requested that he be released from his agreement, unless the work could go on. The matter was referred to the Quartermaster-General, and by him submitted to the Secretary of War. Pursuant to orders of the latter, the contractor was allowed to resume work. The period of suspension was from the 1st December, 1873, to the 3d February, 1874. The defendants have paid for the work done under the contract, but have not paid the damages occasioned by the suspension of the work.

"III. On the 30th October, 1874, General Ord, commanding the Department of the Platte, referred the contractor's claim for damages caused by the suspension to the quartermaster of the post of Beaver, who had had entire charge of the work from the beginning to the completion thereof, with instructions to report as to the damages caused by "the unexpected stoppages and delays inflicted on the contractor, Smith, by the orders from Washington and department headquarters, the exposed and unfinished condition in which he was compelled to leave the buildings during winter storms, the remoteness of the place of building, where all skilled labor had to be provided from a great distance, and which was left sometimes unoccupied and unpaid for on the contractor's hands; the deterioration in value of material left exposed while waiting for orders to continue the work." The post-quartermaster, under these instructions, reported the contractor's losses at $8,000, and the department commander approved the recommendation. The court finds the claimant's damages for the same to be $5,000.

"IV. During the progress of the work the contractor

furnished and performed certain additional or extra work not required by his contract. But on the inspection of the building before the final payment it was found by the inspecting officer that the contractor had omitted to furnish and perform certain work required by the contract. It was subsequently agreed between the contractor and the defendants' officers that the extra work furnished should be received and stand in the place of that omitted by the contractor, and under and in pursuance of such agreement or compromise the contractor was paid the balance remaining due of the contract-price." (Record, 5, 6.)

Upon the foregoing findings of fact the Court of Claims decide as—

CONCLUSIONS OF LAW.

"1. The officers of the Government charged with the care and supervision of the building to be erected by the claimant had no right to hinder or delay him in the proper performance of his work; and for the suspension thereof, ordered by such officers in the supposed interest of the Government, the claimant should recover such damages as were the necessary consequence of the suspension; that is to say, such damages as would place him, as nearly as possible, in the same condition as he would have been in if he had been allowed to proceed without such interference, excluding therefrom, nevertheless, any loss or injury to his materials which might have been prevented by the exercise of reasonable care and prudence on his part in the storing, custody, and preservation thereof.

"2. The estimate or allowance of damages for the suspension of the work, made by the post-quartermaster,

under the instructions of the commanding officer of the department, does not determine the amount thereof, and should be excluded by the court in making a computation of damages.

"3. The extra work on the buildings done by the claimant in addition to that required by the terms of his contract, and the deficiencies under the contract, as determined by the inspecting officer who inspected the work before its acceptance by the Government, as provided by the contract, were proper subjects of compromise and set-off; and having been so compromised and set off against each other before final payment, the claimant is precluded from seeking a recovery for the former." (Record, 6.)

Each party asked for additional findings. The claimant asked the court to find that the officers of the United States, one of whom belonged to the Quartermaster's Department, which was charged with the supervision of the work, saw and knew of the extra work and made no objection to it being done. Refused as immaterial and irrelevant. The court also refused to find, (as immaterial,) otherwise than as stated in their fourth finding, the terms of the agreement as to the extra work, or the items of such work, or that it was done as alleged, not having been required by the original agreement, and was of greater value than the work omitted to be done according to the contract. They did find, upon claimant's request, that the agreement to offset extra work against omissions was made after the extra work was done.

The additional findings requested by the United States, which were refused, were substantially these:

First, for an itemized statement showing how the $5,000 awarded was made up, *i. e.*, how much for each item mentioned in the court's third finding. Second, that it nowhere appears what damage was done to the buildings by exposure to the weather. This was refused, because "*not included in the damages* awarded by the court;" but see the third finding, at the bottom of the fifth page of the record. Third, (to which we call special attention,) "that it nowhere appears in the evidence what amount claimant paid, or what expense he incurred, for the skilled labor which was left sometimes unoccupied and unpaid on the contractor's hands during the period of said suspension." This was "refused as *immaterial* under the conclusions of law." (Record, 9.)

They allowed a finding, in substance, that the claimant had sufficient control of the buildings and material, during the suspension, to have cared for it as he thought necessary and proper.

Before entering upon the discussion, it is best to call attention to claimant's petition, as well as to the contract, which is only made part of the first finding of the court by reference. They are as below given:

"1. On the 25th day of August, A. D. 1873, a contract was made between the United States and your petitioner, whereby he bound himself to superintend or cause to be superintended and assist the soldiers in the erection of buildings at the post of Beaver, according to plans and specifications, and to supply or cause to be supplied all the skilled labor and material necessary for the erection of the buildings in accordance with the said plans and specifications, and in consideration thereof the United States promised to pay your peti-

tioner therefor the sum of $69,177 in three or four installments as the work progressed, less, however, twenty per centum of each installment, which was to be reserved until the completion of the work. Thereafter, on the 25th day of October, A. D. 1873, the United States presented to your petitioner for execution a written agreement, embodying the above-recited contract, but modifying the times of payment as therein provided for. Your petitioner, having then made large progress in and having incurred great liabilities on account of the work, was forced to execute the said agreement or put his whole venture in jeopardy. A copy of the said agreement is hereto annexed.

"2. Your petitioner duly performed his part of the said contract to the satisfaction of the United States, which accepted the buildings and paid your petitioner the said sum of money. Your petitioner did not accept this money in satisfaction of his demands against the United States in the premises, but has always claimed other and further sums of money from the United States for breaches by them of the said contract and agreement, and for extra work done by your petitioner in connection therewith.

"3. The refusal of the United States to pay the contract-price in installments, as they originally contracted to do, very much injured your petitioner's credit, (who had never counted upon executing his contract on his own resources alone,) and by the difficulties it created in his getting labor and materials caused him damage to the amount of one thousand dollars.

"4. About the end of November, A. D. 1873, the United States caused all work on the said buildings to cease, and for about three months prevented your peti-

tioner from going on with the same. All this was done against the protest and remonstrances of your petitioner. The work was so stopped by the United States when two weeks of additional work would have put the buildings in fit condition to stand the winter. At that time the work was in full progress; the skilled laborers, who in that country (Utah Territory) are scarce and difficult to be gotten, were present and engaged on the buildings, and a large amount of material had been collected by your petitioner. This conduct of the United States was in breach of their said contract and agreement, and caused your petitioner great damage. In settling, as he was thereby forced to do, contracts he had made with various persons in respect of the work, he was damaged ($500) five hundred dollars. In repairing damage to the buildings by exposure to the weather during the cessation of the work, and in replacing material then destroyed, your petitioner expended ($1,500) fifteen hundred dollars. By the said act of the United States your petitioner lost 1,200 bushels of lime, slacked and run off for the work in two pits when it was stopped, and worth ($780) seven hundred and eighty dollars; also 10,000 feet of lumber intended for the buildings, which lumber was lost or so damaged as to be useless, and was worth ($500) five hundred dollars; also 20,000 laths intended for the buildings, which laths were so damaged as to be useless, and were worth ($200) two hundred dollars. The wood-work already done was so much affected by exposure to the weather during the said period that your petitioner was forced to expend in extra labor and material in painting it ($250) two hundred and fifty dollars. Your petitioner was also compelled by the said delay to pay ($200) two hundred dol-

lars more than he otherwise would have had to for 100,000 shingles used on the buildings, and thereby also lost ($200) two hundred dollars in glass, paint, and hardware. Your petitioner is also entitled to receive from the United States, by way of damages in respect of their said breach of contract, the sum of three thousand seven hundred and forty-four dollars, being the wages and maintenance of twelve workmen, some of whom were skilled mechanics, for seventy-eight days, during which the work was stopped as aforesaid. In removing snows and protecting the buildings during that period he expended an additional sum of five hundred dollars.

"5. Your petitioner further shows that he did extra work on the said buildings by making a cellar 100 feet long, instead of 40 feet long, as had been agreed upon, which extra work he expended ($600) six hundred dollars upon. On the hospital he did extra work worth ($400) four hundred dollars. The United States got the benefit of all this extra work, and knew of it and of the material applied by your petitioner in time to stop the same without injury to themselves, and knew of the said intended change, and did not object, but received and held the benefit of the said extra work and material.

"6. The said buildings were completed and offered for inspection to the United States on the 25th day of May, A. D. 1874, and they had been duly inspected and accepted on the 21st day of June, A. D. 1874; but the United States, in breach of their contract, did not pay the contract-price until the 30th July, 1874, by which delay your petitioner suffered damage two hundred and fifty-six dollars and forty-seven cents.

"7. By reason of the premises, your petitioner, so far from making any profit by his said contract, has been already a loser thereby, having paid out or incurred liability in respect of his contract for more than the contract-price, and having received no compensation for his time nor skill." (Record, 1, 2.).

The petition then concludes with the usual averment of loyalty and the jurat.

The contract (omitting signatures and the third article, relating to transfer, interest of any member of Congress, &c., not material to this case) is as follows:

"Articles of agreement made and entered into this twenty-fifth day of October, anno Domini one thousand eight hundred and seventy-three, between First Lieut. S. Craig, 8th U. S. Infantry, A. A. Q. M., U. S. Army, of the first part, and Joseph Smith, of Beaver City, Utah, of the second part.

"This agreement witnesseth: That the said First Lieut. S. Craig, 8th Infantry, A. A. Q. M., for and on behalf of the United States of America, and the said Joseph Smith, for himself, his heirs, executors, and administrators, have covenanted and agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, viz:

"First. That the said Joseph Smith, his heirs, executors, and administrators, agrees to superintend, or cause to be superintended, and assist the soldiers in the erection of buildings at post of Beaver, Utah, according to plans and specifications, and agrees also to supply, or cause to be supplied, all the skilled labor and material necessary for the erection of the buildings in conformity with said plans and specifications.

"Second. It is agreed that for and in consideration of the faithful fulfillment of the above stipulations in all their parts, the party of the second part shall be paid by the United States, at the office of the A. A. Q. M., at post of Beaver, Utah, as follows, viz:

"Sixty-nine thousand one hundred and seventy-seven dollars, ($69,177,) provided that the United States is not liable for any amount beyond the sums appropriated for such purpose during the fiscal years in which the services are rendered. Payment to be made in installments at completion of each separate building, or as soon thereafter as funds may be received for that purpose. The buildings to be inspected and accepted by the United States." (Record, 3.)

ASSIGNMENT OF ERRORS.

The United States assign for error—

1. The finding of the Court of Claims that Smith was entitled to damages for the suspension of the work during the period mentioned; and the judgment therefor in the sum of $5,000.

2. The basis and principles upon which said sum was fixed upon as damages; and the method pursued in ascertaining damages.

3. The refusal to find, ("*because immaterial under the conclusions of law*,") as desired by the third request of the defendants, [Record, 9,] the amount paid or expense incurred for skilled labor left upon the contractor's hands during said suspension.

4. The first "conclusion of law," stated by the court, upon page 6 of the record, as follows: "The officers of the Government, charged with the care and supervision of the building to be erected by the claimant, had no

right to hinder or delay him in the proper performance of his work; and for the suspension thereof, ordered by such officers in the supposed interest of the Government, the claimant should recover such damages as were the necessary consequence of the suspension; that is to say, such damages as would place him as nearly as possible in the same condition as he would have been in if he had been allowed to proceed without such interference, excluding therefrom, nevertheless, any loss or injury to his *materials* which might have been prevented by the exercise of reasonable care and prudence on his part in the storing, custody, and preservation thereof."

ARGUMENT.

The petition is a part of the record. Its allegations bind the claimant and limit his right of recovery.

The propositions stated in the several articles of the petition are:

1. That an oral agreement was made for this work August 23, 1873, by virtue of which he incurred expense, and was thereby constrained to enter into the written contract.

The reply is threefold: That there was no authority to make a verbal agreement, which was therefore void; that it was merged in the subsequent writing; and that the *motive* for the execution of the instrument, forming no part of its *consideration*, was immaterial. (Philpot *v.* Gruniger, 14 Wall., 570; Thomas *v.* Thomas, 2 Ad. & El., (N. S.,) 859; 2 Q. B., 949; Fitch *v.* Snedaker, 38 N. Y., 252.)

2. Performance and acceptance of the work, and pay-

ment therefor; but a denial that the payment was accepted in satisfaction, and a claim of damages for the breach and for extra work.

This involves the main question of Smith's right to recover *any* damages, and will be fully discussed below.

3. Claim for $1,000 damage *to his credit* by failure of United States to pay by installments, as agreed.

We believe that nothing was found or ultimately claimed under this article. If any sum was due at a stated time, he could claim nothing more than interest while it was detained. Consequential damages cannot be considered as arising from a mere failure to pay money. "No matter what the inconvenience sustained by the plaintiff, the measure of damages is the interest of the money only." (Mayne on Dam., 6; 17 C. B., 29.)

4. This fourth article is the one to which attention will be mainly directed. It alleges those grounds and items of damage which the claimant considered he must prove, but which the court determined to be "immaterial." As this subject will be discussed *in extenso* below, nothing will be said about it in this part of the brief, except that upon the theory adopted by the Court of Claims, (adopting the case of Marsterton *v.* Mayor, 7 Hill, 72, as the rule of this,) Smith's dealings with his sub-contractors was wholly immaterial, as were the other injuries stated in this article.

5. Claim for extra work.

No pretense that this work was done at the *request* of the United States or that they derived any *benefit* therefrom, but only that some (unnamed) officer saw it at some stage of its progress and said nothing about it.

It is enough, however, that the Court of Claims finds that all extras were offset against certain omissions, and the settlement of the contract made upon this basis.

II.

THE CONTRACT is peculiar and must be carefully examined. By its terms, Jos. Smith agrees to superintend and *assist soldiers* in erecting the proposed buildings at Beaver (military) post, Utah, according to plans, &c.; to supply "all the *skilled* labor and material necessary" for their erection in conformity with the plans, &c.; to be paid $69,177, in installments, as soon after completion of each separate building as funds might be received by the assistant quartermaster at Beaver, by whom the payment was to be made; *provided* that the United States were *not to be liable for any amount beyond the sum appropriated* for such purpose *during the fiscal year for which such services were rendered;* the buildings to be inspected and accepted by the United States.

The construction of this written contract is for the court. The tribunal from which we appeal saw no occasion to construe it, probably, because it considered the present claim as outside of and collateral to it, arising from the suspension of it, rather than from the instrument itself. We think they were in error—why, we shall presently proceed to state—but will first call attention to the stipulations of the writing which we deem important.

It is very peculiar in this, that *no time* is fixed for the completion of the work. In this respect it differs from those cited in the opinion of the Court of Claims, (6 Wall., 543, and 17 Wall., 592,) and from almost every contract

which is made the foundation of a suit. The work was to be done by soldiers, the claimant furnishing only a few "*skilled*" laborers. It was evidently supposed that it would extend over several years, because the payments were limited to the amount thereafter to be appropriated in each fiscal year.

If, no time being mentioned, the buildings were to be erected within a reasonable time, what would be such reasonable time must depend upon the circumstances of the case and the terms of the contract, prominent among these being the fact that the labor of soldiers at a frontier post is to be employed therein. This labor is subject to the military exigencies of the time and place. The laborers can be detailed to this work only when not needed for more warlike purposes. Their officers alone can determine when they can be spared for this work, and when it must be suspended on account of military demands. The contract is made October 25, while it is evident that mason-work can not be properly done in winter. In contemplation of this state of things, the contract is made with a view to the possibility of its extending over a series of years, and being performed interruptedly. The contractor assumed the risks of this uncertainty. (Bulkley *v.* United States, 19 Wallace, 40.)

Further analysis of the contract will be made in the course of this argument with reference to the various topics in their natural order.

III.

THE FINDINGS OF FACT by the court state: (1) The preliminary negotiations resulting in the contract of October 25, 1873; (2) the enforced suspension of the work, against the protest of Smith, who asked to be

and (after two months' interruption) was *permitted* to resume and complete it; (3) the reference to the post quartermaster to ascertain the damage done to the contractor, and his report fixing it at $8,000, which sum (*for the same items*, however) the Court of Claims reduces to $5,000; and (4) the extra work, offset against omissions, after it was done, and payment of the full contract price.

IV.

THE CONCLUSIONS OF LAW at which the court arrive are: (1) That the Government officers had no right to hinder or delay the contractor, who is entitled to recover, on account of the *suspension*, such damages as will place him in the same position as if he had been allowed to proceed without interruption, less any injury to *materials* which proper care upon his part would have averted; (2) that the report of the assistant quartermaster does not conclusively fix the *amount* of such damages; (3) that the claim for extra work is barred by the agreement to offset made after its completion; (4) that it was not necessary to determine the specific items of damage, and "*immaterial*" what sum the contractor actually paid for skilled labor, &c., during the suspension.

V.

DAMAGES.

The purpose for which most personal actions are instituted before any tribunal, and for which all petitions are presented to the Court of Claims, under general statutes, is the ascertainment and recovery of damages.

Those awarded in the present case were wholly for the loss which Smith *might* have suffered by the enforced

suspension of the work under his contract, (see first conclusion of law, Record, 6; and third finding of fact, Record, 5-6,) where all the elements upon which the damages were assessed are stated.

We shall first inquire as to Smith's right to recover *any* damages, and then, if found entitled to any, upon what legal principles they are to be assessed. In both respects the law must be the same as if the suit were against a private citizen. (Smoot's case, 15 Wall., 45.)

I. Whether or not he ought to be awarded *any* damages is a question of law, depending upon the acts done, taken in connection with the terms of the contract between the parties, or as affecting the same.

If, as we have briefly suggested above, the contract was indefinite as to time because it was understood that the work might not be carried on continuously, but was to be subject to the contingency of the soldiers being diverted to more warlike pursuits, then, of course, no legal damage accrued, however inconvenient or injurious the circumstance might be from that interruption which the parties contemplated.

Was Smith bound to keep any number of skilled mechanics continuously employed? Or could he, as the days approached their briefest span, and the cold made the labor less comfortable and efficient, postpone operations till the ensuing spring? If he had a right to make such postponement, the Government would have the corresponding one to insist upon it; whereas it does not follow that if he could not divide the work the United States could not, if we are correct in assuming that its execution was subordinated to the military demands upon the soldiers who were to do the bulk of the

work, or if mason-work could not be done in winter with safety to the permanency of the structure.

Again, if damages might have been recovered for the original stoppage of the work, the claim to them was waived and abandoned when the contractor sought and obtained permission to resume and complete it.

Either the contract did not require continuous work, or else such continuity was a condition; equally so (if at all) whether express or implied by law. If a condition, it was one the parties could waive, and by their acts they did so. If the agreement had limited the date of completion to January 1, 1874, and that day had found the work unfinished, the Government could have waived the delay and allowed more time; so the contractor could waive an interruption and resume operations. He could elect which to do, to abandon the contract and sue for (if necessary) his damages, or to wait and argue the matter till permission to resume were obtained; but, having made his election, he cannot claim all the benefit derivable from *both* courses. (Gibbons *v.* United States, 8 Wallace, 273.)

We shall show hereafter that Smith, at most, never became entitled (upon this evidence) to more than nominal damages, which are not recoverable of the United States, and that he is, therefore, now entitled to no damages.

II. If entitled to any damages, upon what basis are they to be assessed? *Compensation* is the proper standard. (2 Greenl. on Ev., § 253; Wicker *v.* Hoppock, 6 Wallace, 99; Bussey *v.* Donaldson, 4 Dallas, (Pa.,) 207; Rockwood *v.* Allen, 7 Mass., 256; Hunt *v.* D'Orval, Dud-

ley, (So. Car.,) 183; Smith *v.* Sherwood, 2 Texas, 460 Robinson *v.* Varnell, 16 Texas, 391.)

The derivation of the word (*com-pendere*) indicates the process; one thing is to be weighed against another until they exactly balance.

What is compensation is a question of law. (Sedgw. on Dam., 201; Gilmore *v.* Hunt, 66 Penn. St., 325; Graves *v.* Dash, 12 Johns., 23.)

Adherence to precise rules of damage is desirable. (Batchelder *v.* Sturgis, 3 Cush., 201; Arrowsmith *v.* Gordan, 3 La. An., 110.)

We are to determine this compensation in view of the fact that the Government had the same right to abandon its purpose and this contract that it had originally to enter upon its execution, subject to the duty and liability to see that the contractor was not injured by the abandonment. (Moore *v.* Howard, 18 La. An., 635.) The code agrees with common law. The implied condition of the contract, as much a part of it as though written or printed therein, was that the United States would either pay the stipulated price for the completed structures, or such sum as Smith reasonably ought to have, if not permitted to finish them. Compensation is to be adjusted in view of this condition of the contract. Danforth *v.* Walker, 37 Vt., 240, 244. If a landowner changes his mind and concludes not to erect upon his land the structure originally proposed, the contractor for its erection cannot insist upon its being placed there, and upon going on to its completion. All

that he can fairly, reasonably, and legally ask is, that he shall not suffer by this change of purpose upon the part of the land-owner, and to receive such sum as will place him in the same condition pecuniarily, whether the building is finished or abandoned.

The first inquiry, in searching for a correct method of computing damages, is, *to what point of time* is the computation to be directed? and the obvious reply is, that we are only to refer to that at which the contract was broken. For all injury which was *then* and thereby inflicted, or which necessarily resulted from the act then done, though apparent subsequently, compensation is to be allowed. (3 Ind., 110; Bradley *v.* Denton, 3 Wisc., 568; Arrowsmith *v.* Gordan, 3 La. An., 110.)

This rule is correctly stated in Jones *v.* Van Patten, 3 Ind., 110, to which attention is invited. That court say that in an action for breach of a contract, the true measure of damages is the amount necessary to put the party in as good a condition as he would have been in *at the time the contract was broken*, as if there had been no breach. The date of the breach fixes the time for estimating the damages.

Assuming this as the time to which we are to refer, it becomes apparent from the whole record, from the petition to the findings, that *every item* which goes to make up the petitioner's claim, and for which this $5,000 judgment is given, *accrued after December* 1, 1873, *when the contract is declared to have been broken by the stoppage of the work*, and was not at all the necessary and "inevitable," or even natural, result of that breach, but resulted from an entirely different cause.

Either the interruption of this work was a breach of the contract or it was not. If no breach, then there is no right of recovery for exercising a power given by the contract, however injuriously it operated upon the claimant. If it was a breach, at the moment the order was enforced the claimant's right to damages became then and thereby fixed and determinable with reference to the state of things then existing or naturally resulting therefrom. (Danforth *v.* Walker, 37 Vt., 240–244.)

If the completed contract would have resulted in no benefit to him, Smith was not, December. 1, 1873, entitled to recover anything for its breach, having been paid for all actually done by him. (Lentz *v.* Choteau, 42 Penn. St., 438; Durkee *v.* Mott, 8 Barb., Sup. Ct., 427; Culbertson *v.* Ellis, 6 McLean, 248.)

If profit could have been made by completing it, Smith was entitled to the expense to which he had been put for labor and material, and to such profit as was incidental (and not collateral) to that contract; but he was not entitled to keep men, &c., on hand indefinitely at the expense of the Government, in order to see whether or not he could persuade the authorities to permit him to resume.

Smith has received *all that his work is worth* to the United States; *all that the contract entitled him to receive* for its completion. The men and materials were not kept on hand during the suspension at the *request* of the United States, nor for their *benefit*, any further than they were benefited by the erection of the buildings, for which the contract-price was the fair and stipulated equivalent. It is a universally accepted doctrine that a party is only entitled to recover, not merely for injuries which are the natural result of the breach, but

which he could not, acting reasonably, prevent. (Cin. and Chi. R. R. Co. *v.* Rodgers, 24 Ind., 103, and other cases cited below, and books, *passim.*)

The Court of Claims applied this to the *materials*, why not to the *labor* also?

To repeat, the damages now claimed are not, any of them, the result of the alleged breach of contract, but of Smith's own act and choice in subsequently keeping the men, &c. For the breach he might sue and recover; for his own act he cannot. (Hamlin *v.* Gt. No. Ry. Co., 1 Hurl. & Nor., 408; Bradley *v.* Denton, 3 Wisc., 568.)

Was Smith *bound* to keep these men, &c., after December 1, 1873? If so, for how long? Could he have rendered the defendants below liable for their wages, &c., indefinitely? If not, for how long? We say, not for a day. (Durkee *v.* Mott, 8 Barb., Sup. Ct., 426.) But if he was *not* bound to keep them, then the United States are not bound to pay for them, (Bradley *v.* Denton, 3 Wisc., 567,) because it was an expense voluntarily and unnecessarily incurred. (Allen *v.* Thrall, 36 Vt., 711.) There was no *express* contract between these parties for the keeping and wages of these unemployed men, &c., though the only contract then existing (December 1, 1873, to February 3, 1874) was the one above printed; nor was there any such contract *implied*, both because there was an express one, and because they were not kept and paid, &c., at the request nor for the benefit of the United States.

The claimant had a valid contract with the United States. Conceding, for the sake of the argument, that it was broken by the United States, then the petitioner

has not shown any damages resulting from that breach. Ordinarily, proof of the breach of a valid contract entitles the plaintiff to nominal damages, without showing actual damage. (Pastorius *v.* Fisher, 1 Rawle, 28; Devendorf *v.* West, 42 Barb., 229; Owen *v.* O'Reilly, 20 Mo., 603; Hagan *v.* Riley, 13 Gray, 515; McCarty *v.* Beach, 10 Cal., 464; Waldron *v.* Berry, 22 Me., 486; Linder *v.* Lake, 6 Iowa, 169; Prob. Ct. *v.* Slason, 23 Vt., 308; State *v.* Murray, 24 Md., 310; Dent *v.* Davidson, 52 Ill., 109, 111; Hope *v.* Alley, 9 Tex., 394; Smith *v.* Whiting, 100 Mass., 122; Bond *v.* Hilton, 2 Jones, (No. Car.) Law, 149; Cowley *v.* Davidson, 10 Minn., 392; Rosenbaum *v.* McThomas, 34 Ind., 332–3.)

This nominal damage, however, is always extinguished by payment of the principal indebtedness, (Beaumont *v.* Greathead, 2 Man. Gr. & Scott, (2 C. B.) *499,) and is not recoverable of the United States through the Court of Claims, (Grant *v.* United States, 7 Wallace, 338, last sentence of opinion.) Probably because, as said by Maule, J., in Beaumont *v.* Greathead, *ubi sup.*, "nominal damages are a mere peg on which to hang costs," and the United States are not liable in costs.

A party prevented from performing can only recover the loss *actually* accruing to him *directly from the prevention.* To quote the language used in Chamberlin *v.* McAllister, 6 Dana, 360: "Did they sustain any damage? Then they were entitled to recover to the extent of that damage, but to no greater extent. As the amount of compensation which they had received exceeded the amount of work which they had done, and as, moreover, they did not attempt to prove any special loss or damage, they were not entitled to recover anything." (Caldwell

v. Reed, Litt. Sel. Cas., 366; Allen *v.* Thrall, 36 Vt., 711; Hood *v.* Raines, 19 Texas, 400.)

"The *primary and immediate result of the breach* of contract can alone be looked to." Mayne on Dam., (Eng. ed., 1856,) 6; or, as stated in the case of Hadley *v.* Baxendale, 9 Exch., 341, 354, as cited upon the next page (7) of Mr. Mayne's work, the damages are to be "such as may fairly and substantially be considered as arising naturally, *i e.*, according to the usual course of things, from such breach of the contract itself," &c. Could it reasonably be supposed if the work was stopped and the contract thereby broken, that the contractor could or would keep men idle for months to see if he would be allowed to resume, and that he would replace material damaged or destroyed by the stoppage of the work?

The damages now claimed, not being the natural consequence of the breach itself, we say cannot be recovered; if it were possible to consider them as *special* damages resulting from the breach, then the judgment is wrong, because it is not, and does not profess to be, based upon proof of the items which alone could properly make up a claim for special damage in a case where such damage is recoverable.

"A plaintiff who claims damages for the loss of a contract is as much bound to prove that he has sustained damages as he is to prove the contract itself. The jury cannot be asked to guess. They cannot try the case upon conjecture." (Lentz *v.* Choteau, 42 Penn. St., 438; Stevenson *v.* Smith, 28 Cal., 102; Pastorius *v.* Fisher, 1 Rawle, 29; Funk *v.* Cresswell, 5 Iowa, 64; Linder *v.* Lake, 6 Iowa, 169; Wilson *v.* Barnes, 13 B. Mon., 331.)

This claimant and his counsel so understood the law

when the petition was filed and when the cause was argued. In his petition he avers, in his fourth article, (Record, 1,) that he was forced by the suspension and breach to settle contracts with various persons respecting the work, whereby he was *damaged* (not that he paid) $500; and then states various other items, concluding with "the sum of $3,744, being the wages and maintenance of twelve workmen, SOME of whom were skilled mechanics, for seventy-eight days during which the work was stopped, as aforesaid." (Record, 2.)

The court say, in the opinion, (Record, 7, folio 12,) that "In estimating the damages caused by this suspension of the work, *both* parties have gone, to a greater or less extent, upon the actual expenditures of the contractor to his subcontractors and workmen. We do not understand this to be the rule for measuring the damages in such cases." Referring to the opinion as indicating "the course of reasoning which conducted the court to its judgment, and explaining the views and motives of the court," (Williams *v.* Norris, 12 Wheaton, 118,) we understand why, when requested, it refused, as "*immaterial*," to find the several elements of damage, or "what amount claimant paid, or what expense he incurred for skilled labor," &c. (Record, 9, folio 18, requests I and III.) We claim this is legal error. The *existence* of a fact is question of fact; its *materiality* is question of law. The request was refused upon the ground that *actual expense* was not an element of damage. This is clear from the record, then, as well as from the opinion. The quotation from 12 Wheaton, 118, reminds me to say, in passing, that the opinion of the Court of Claims stands upon a very different footing from that of

other tribunals, inasmuch as it is not "pronounced after a verdict was rendered, and consequently having no influence on that verdict," (*id.*,) but is declared concurrently with the verdict and as stating the precise legal grounds upon which its rendition rests. The opinion is as much the conclusion of law of the court as those paragraphs which are formally so entitled.

The requests to find the amounts actually paid, and the refusal, based upon the ground that this was *immaterial*, does raise, however, the legal question we desire to present, since these requests and refusals are part of the record, (Rule 5, as to appeals from the Court of Claims,) and sufficient for our purpose.

Premising that this is not a case where the contractor can claim as damages the excess of the contract-price above the cost of the work, we ask whether or not, in an action for such a breach of contract as is here stated, *the sums actually paid* in consequence of that breach, under circumstances like those of this case, are an element of damage? The Court of Claims hold the negative, saying: "We do not understand this to be the rule for measuring the damages in such cases. The Government is a stranger to the sub-contractors and workmen, and *is not interested in the amounts paid to them.* If the contractor had paid to them three or four times as much as the necessities of his case required, the Government would not be liable for such excess; and if they had waived all claims upon the contractor or compounded with him for a nominal consideration, *his good fortune would not have enabled the Government to throw off its own liabilities.* The instructions which should be given to a jury in such a case, we apprehend, would be not to inquire into the private or *ex-parte* transactions of this con-

tractor, but to ESTIMATE *the natural and inevitable losses* caused to *any* contractor by such a suspension on such a building, taking into consideration the condition of the work, the magnitude of the contract, the cost of labor and material, the remoteness of the situation, and any other element of loss which would affect *any other party* interfered with in like circumstances." (Record, 7, folio 12.)

The court was right in holding that, if the contractor paid "three or four times as much as *the necessities* of his case required, the Government would not be liable for the excess;" but this arises from the principle that he can only recover for those losses and expenses which he could not, with reasonable care, escape, and not for *unnecessary* expenditures. (Miller *v.* Mariner's Ch., 7 Maine, 55, 56; Shannon *v.* Comstock, 21 Wend., 460–2; Heckscher *v.* McCrea, 24 Wend., 313; Worth *v.* Edmonds, 52 Barb., Sup. Ct., 42; 24 Ind., 103, and authorities *passim.*) Hence, the court erred when it hastily inferred that it was of no consequence what he did actually pay. We say he can only recover what is actually and necessarily paid in good faith; but the Court of Claims declare that, because the contractor cannot recover an exorbitant amount, paid in bad faith, it is immaterial what sum he was obliged to pay in good faith!

The further suggestion, that a waiver by the workmen of all claim upon the contractor would be merely "his good fortune," is equally erroneous. Though it is true that such a circumstance "would not have enabled the Government to throw off its own liabilities," whatever they might be, it would be material in determining the amount of that liability. In the cases just above cited, where a charterer fails to provide freight and

another person offers it, (21 Wend., 457, and 24 Wend., 303,) the ship-owner was not allowed to claim full damages from the charterer and claim the freight-money received from others as "his good fortune," arising from a contract to which the charterer is a stranger, and therefore "not interested in the amounts paid" by them,—"the private and *ex-parte* transactions" of the ship-owner.

The issue between us and the Court of Claims (for the opinion states that "*both parties*" were agreed upon the law) is, that we contend Mr. Smith, if entitled to anything, can only recover his actual damages, of which the sums really disbursed for labor, &c., are items, while that court holds the proper course to be "to estimate (guess or conjecture?) the natural and *inevitable* losses caused to *any* contractor by such a suspension," &c., and therefore they refuse to find actual expenditures "as immaterial under the conclusions of law."

Mr. Smith's judgment for $5,000 damages must be supported either by proof of the injury actually sustained, or else by implication of law arising from proof of the breach of contract. The Court of Claims put it upon the latter ground, "the natural and inevitable losses to *any* contractor," &c, since they admit that no *evidence* fixes it at precisely $5,000, *or at any other sum whatever*, but that it must (be conjectured to) have been at least $5,000.

But we have already mentioned that "where the law implies the injury, it also implies the lowest damage." (Sedgwick on Dam., 48, citing cases.) If more is to be recovered, it is by specific proof of the facts upon which each item rests.

The only possible damage to Mr. Smith, since he was

not to own the buildings and suffer continuing inconvenience from any bad effect of the weather, &c., upon them, was a pecuniary one. He was injured to the amount of just so many dollars and cents as the suspension required him to pay out, and no more. This ought to be susceptible of proof; but if he cannot adduce the evidence, he is in just the position of every other plaintiff who, however good his claim, cannot legally establish it. "*De non apparentibus*," &c. In the language of Strong, J., in Lentz *v.* Choteau, already cited, "Now, a plaintiff who claims damages for the loss of a contract is as much bound to prove that he has sustained damages as he is to prove the contract itself. The jury cannot be asked to guess. They are to try the case upon evidence, and not upon conjecture. The right to recover nominal damages may be complete when it is shown that any damages have been sustained; but if more is asked, there must be proof of more." (42 Penn. St., 438.)

If any contract existed between the United States and Smith, outside of the written one, and relative to this so-called "suspension," it was one of *indemnity*, implied by law, to wit, that Smith should not *lose* anything by this suspension; not that he should be allowed to *make* anything out of it. For whatever damage he suffered by a termination of the contract December 1, 1873, he could have obtained redress, had he never resumed the work; but, resuming it, he should have for the interruption only what *that* cost him, if entitled to anything. That was not a contract out of which *profit* could arise; *indemnity* from *loss*, not from *liability*, is its utmost limit, (6 Wall., 99, cited *infra*.)

The case of Hagan *v.* Riley, (13 Gray, 516,) states the

law applicable to such a case. A constable attached Riley's property at the suit of Hagan; Riley, claiming the property to be exempt, sued the officer for attaching it; Hagan, having given bond of indemnity to the attaching officer, agreed to pay Riley to withdraw his suit and Riley agreed to do so, but failed to keep that agreement, entered his action, and thereby put the constable to $40 expense, which he claimed of Hagan, *but which Hagan had not paid when he instituted the present action*, though liable for it upon his bond. This suit was against Hagan for breach of contract in entering suit and not withdrawing it. The court were "inclined to the opinion that if the plaintiff *had paid* the officer his cost, he might recover it in this suit, as incidental damages. * * * * It was not a mere contract of indemnity; it was a contract to do something beneficial to the plaintiff, the failure to do which necessarily subjected the plaintiff to loss. For that loss, *when actually incurred*, the defendant is liable." (13 Gray, 516.) There has always been a distinction made, hinted at above, between an indemnity against *loss*, and bonds or agreements specially conditioned to indemnify against *liability*. It is only in case of the few instances of bonds, &c., containing this express condition that any substantial recovery can be had upon proof of *liability;* in all other cases there must be proof of *actual* payment or *loss*. (Jones *v.* Lewis, 9 Dowl., 143; Dent *v.* Davidson, 52 Ill., 111-12; Gilmore *v.* Hunt, 66 Penn. St., 325, a parallel case to the present; Jeffers *v.* Johnson, 1 Zabr., 73; Burt *v.* Dewey, 40 N. Y., 283, 285, *q. v.*; Churchill *v.* Hunt, 3 Denio, 321; Gilbert *v.* Winan, 1 Comst., 550; Funk *v.* Cresswell, 5 Iowa, 62; Ward *v.* Haws, 5 Minn., 440; Osgood *v.* Osgood, 39 N. H., 209; Child *v.* Eureka

Works, 44 N. H., 354; Cushing *v.* Gore, 15 Mass., 69; Little *v.* Little, 13 Pick., 426; McEvoy *v.* Wilson, 25 Cal., 172. See also Wicker *v.* Hoppock, 6 Wall., 99.) That was for failure to keep a promise to bid, upon certain chattels, the amount of specified judgments, levied upon them at the promissor's request. This court, *per* Swayne, J., said: "The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be *equal to the injury.* The latter is the standard by which the former is to be measured." * * * "If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases, the obligee cannot recover till he has been actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of damages is the full amount agreed to be paid." (6 Wall., 99.)

If there was any contract at all relative to this suspension, it was (by implication of law) to indemnify the contractor by paying him only so much as he might reasonably be obliged to expend upon that account.

This case is not at all like that of Marsterton *v.* Brooklyn, (7 Hill, 61,) recognized in United States *v.* Speed, (8 Wallace, 85,) as we shall further show hereafter. Had Smith elected to consider his contract broken December 1, 1873, his damages (had his construction of the writing been upheld) would have been, as stated in those cases, the difference between the contract-price and the

cost of doing the work, estimating values of labor and material as of the day of the breach; but that is manifestly inapplicable here, since he did *not* elect to avail himself of the breach, and of his right to damages so ascertained, but went on and finished, and settled under the contract, receiving the price thereby stipulated. Upon the basis of a breach happening December 1, 1873, there is nothing due for the items we are considering, since all accrued subsequently and do not come in as part of the cost of completing the contract, but resulted (as the claimant says) from an unauthorized breach of it, or (as we say) from his voluntary retention of men, &c., while seeking to be allowed to complete it.

We think there is a fundamental error in the assumption of the Court of Claims that there was, or can be, such a thing as the suspension of a contract. There may be a suspension of *work*, as there confessedly was here, either authorized by the contract or by the parties thereto, or else unauthorized and constituting a breach of it; but the *contract* can only be suspended by the original or some supplementary agreement. The language of this Court in Gibbons *v.* The United States, (8 Wallace, 273,) is pertinent here: "It is very clear that but one contract was ever made in this case, and that the plaintiff was absolved from this by the refusal of the quartermaster to receive the oats, [work, &c.,] when tendered. But from whatever motive he may afterward have consented to *renew* that agreement and proceed to its fulfillment, its terms were the same. If such pressure was brought to bear upon him as would make the renewal of the contract void, as obtained by duress, then there was no contract, and the proceeding was a tort for which the officer may have been personally lia-

ble. *If the plaintiff's consent* (*i. e.*, to the renewal) was voluntary, then the contract to which assented is binding, and must control the case. The quartermaster treated the contract as still in force, and his demand on the plaintiff was made under that idea. *In this he was wrong.* But the plaintiff had his option to concur in this view, and deliver the balance of the oats, or to refuse to deliver any more." (8 Wallace, 273.) Applying the language of the opinion on the following page, (274,) we say that if the suspension was unauthorized, and so a tort, the Government is not liable therefor. We specially cite that case here though, as recognizing the doctrine that the refusal of one party to permit performance by the other is a termination of the contract, and any subsequent resumption must be by a renewal of the original agreement; that is to say, a new agreement, to proceed upon the terms of the former.

We have been unable to find any case in which the stoppage of work under a contract, by him for whom it was being done, has been treated otherwise than as a termination of the contract, except the single one of Figh *v.* United States, (8 Court of Claims, 319,) in which no appeal was taken. Figh's contract stipulated that the work should be "prosecuted *without delay* to completion by January 1, 1856." (*Id.*, 321.) In the opinion, Milligan, J., says, (page 322:) "The case, as thus presented, is somewhat *novel* in at least one of its features. It involves the question of the right of the claimants to recover damages for a wrongful temporary suspension of the fulfillment of a written contract by the defendants which the claimants afterward, at the instance of the defendants, [not so, here,] did perform, and for which they have been fully paid."

(8 Court of Claims, 322.) For one party to prevent the other from performance was nothing new. The novelty was in the party prevented contending that such forcible interruption did not terminate it, and give right to full damages for all injuries received, but that one party could arbitrarily "suspend" and decree the resumption of a contract. The circumstance of its novelty, in so familiar law as that pertaining to contracts, is an argument against its soundness. A contract cannot be *in nubibus*. No case sustaining it is cited in Figh's case, nor in that at bar, by the Court of Claims. In Wm. Clark's case, (6 Wallace, 543,) cited, there was no attempt to "suspend" or terminate the contract. The extent of the interference was to dictate the places where earth should be dumped in execution of the contract; and in that and the Amoskeag Company's case, (17 Wallace, 592,) also cited, this court merely said that the Government could not request and occasion delay by alterations, &c., and then refuse to accept the work because not finished within the time specified.

We do not see how the doctrine of Garrison's case, (7 Wallace, 688,) the third and only other case cited by the court below, is at all applicable to the present one, since it merely construed a written supplemental stipulation, indorsed by the Government's agent upon the original agreement, and immediately and willingly accepted and acted upon by the contractor.

The "suspension" in the present case cannot be considered an "alteration" of the original contract, (as it is declared to be by the Court of Claims in the opinion, Record, 7,) because one party has no right to alter the contract without the consent of the other, and the case

shows that Mr. Smith never assented to the interruption of the work. (Record 5, finding 11.)

There was no *express* contract to pay for suspension of the work, for Mr. Smith refused to enter into any contract for such suspension. We do not see how one can be *implied* against the protest of the person for whose benefit the implication is now sought to be made. But if *any* contract arose by implication of law from the stoppage of the work and its subsequent resumption, it could be nothing more (as we have already remarked) than one to re-imburse Smith for his actual loss by the suspension.

These expenses were not general damages, naturally resulting from the stoppage of such a work. *Ex necessitate*, the injury must depend upon the state of the work when stopped. If the contractor, upon being prevented, abandons his job and claims damages, it *is* "*immaterial*" what he has contracted with others to expend upon it, because the damages are the difference between the estimated cost of the *completed* work and the contract price; but if he stops and subsequently resumes, claiming for the injury thereby done to the materials previously provided, &c., the state in which the work was when interrupted is all-important. Where a party is stopped, and thereupon abandons the contract, the difference between the contract-price and the estimated cost of its completion is the measure; but here the contractor *has received the full contract-price*, which can, therefore, no longer be used as the subtrahend; he has actually completed the work, so there is no occasion for estimation, and whether he has made or lost by the contract is "immaterial;" but it is very material to what extent the interruption damaged him, if unauthorized; how much *additional*

The rule in Masterton's case, affirmed in U.S. v. Speed 8 Wall., 85: applies only where profits are an element for consideration; i.e., where it becomes necessary to ascertain whether the estimated cost of completing an abandoned contract would exceed the contract price, so as to determine whether the plaintiff has been damaged by a loss of profits — which is not this case.

material and labor he was thereby compelled to provide, more than would otherwise have sufficed to finish the buildings according to contract. Therefore, the court of New York expressly confine the rule of damages stated in Marsterton's case to "cases like the present," *i. e.*, those where the contract is never carried out. (7 Hill, 72.) Here is the wide difference between this case and that of Masterton *v.* The Mayor. The damages then become *special* and not general. If he had so many bushels of lime slaked, which thereby spoiled, &c., &c., he must prove it. He must likewise prove his case, if he claim to be indemnified for whatever he lost by the suspension. In any event, the damages are special and must be specially laid and proved; particularly where, as here, they were not the natural result of the stoppage, but of the contractor's desire to complete the work, and keeping the men for that purpose. (Vanderslice *v.* Newton, 4 Comst., 130; Pastorius *v.* Fisher, 1 Rawle, 29; Linder *v.* Lake, 6 Iowa, 169; 5 Iowa, 64; 42 Penn., 438; Wilson *v.* Barnes, 13 B. Mon., 331; Stevens *v.* Lyford, 7 N. H., 365; Dickenson *v.* Boyle, 17 Pick., 79; Furlong *v.* Polleys, 30 Maine, 493.) "In actions upon contracts no damages can be given which cannot be specifically stated." (Hamlin *v.* Gt. No. Ry. Co., 1 Hurl. & Nor., (Exch.,) 411; Arrowsmith *v.* Gordan, 3 La. Ann., 109, bottom; Hunt *v.* D'Orval, Dudley, (So. Car., 185.) "The difficulty in this case is to ascertain what is due, and, in the absence of *proof* to that effect, a nonsuit was proper." (Teal *v.* Auty, 2 Brod. & Bing., 101.) If the plaintiff, having shown a breach of contract, would recover more than nominal damages, "the burden is still upon him to show that he has suffered more," and *how much* more. (Winslow *v.* Lane, 63 Maine, 163; Quinn *v.* Van Pelt, 56 N. Y., 419; Grier *v.* Ward, 23 Geo., 150, bottom.)

The present case is a signal example of the necessity of exact proof, instead of asking court or jury "to guess;" of the propriety and justice of the suggestion of Judge Strong, in 42 Penn., 438, that we "are to try the case upon *evidence*, and not upon *conjecture*." The Court of Claims conclude that "the natural and inevitable losses to any contractor" "must have been at least $5,000;" though they declare the facts which go to show *this* contractor's *actual* loss "immaterial;" so they give us nothing but their own inference of the natural effect of so stopping such a work, so situated, for fixing the damages at $5,000 instead of $1 or $50,000; unless they assume the keeping of men, &c., on hand for two months to be the natural effect of a stoppage; and then they do not consider the *actual* wages of these men, nor the number of men, but the general fact that skilled labor was scarce and wages high. We will add a suggestion about this "skilled labor." By his contract Smith was to furnish "*all* the skilled labor," &c.; he could only employ *such* labor, and it was a breach of his contract if he furnished any other; by far the largest item of damages mentioned in his petition ($3,744) is for 78 days' pay, at $4 per day, of twelve men; yet his petition states this sum to be "the wages and maintenance of twelve men, SOME of whom were skilled mechanics." How many? *Non constat* that he had more than two "skilled" workmen. By their statement of the dates of stoppage and resumption, the court reduces the working-days of the suspension to 53; but they do not consider this an element of damage, unless as forming the basis of a conjecture what it would cost "any contractor" to suspend for 53 days; nor that it makes any difference what number of skilled men he

had or paid. If he had but six, reducing that item proportionately, and striking out the extras and other items which the Court of Claims say they did not include, (and properly omitted, upon any hypothesis,) it is apparent that they have allowed this contractor more than he could have lost, upon *legal* items; and this result is reached by adherence to an inflexible principle of law; to wit, "the natural and inevitable loss to *any* contractor," although in fact *this* contractor has been fortunate enough to avoid the inevitable. This rule, as we have above remarked, can only be applied where the contract has been entirely abandoned, and is never resumed. If the contract is completed agreeably to its terms, the contractor only receives the contract-price, whether more or less than he has expended. If rescinded by the other party, against the contractor's will, he can only recover the profit, ascertained by deducting estimated cost of completion from contract-price. But if merely interrupted and resumed, he is only entitled to the *actual* damage caused by the interruption. This statement is a comprehensive resumé of our argument.

EDWIN B. SMITH,
Assistant Attorney-General.

IN THE

Supreme Court of the United States.

No. 798.

THE UNITED STATES, APPELLANTS,

vs.

JOSEPH SMITH, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

Argument of Mr. James Lowndes, for Appellee, submitted under Rule XX.

I. The fourth assignment of error goes to the principle of law on which the decree rests, and is here considered first.

That principle is set out in the first two paragraphs of the conclusions of law (Transcript, fol. 11) in these words:

"The officers of the Government charged with the care and supervision of the building to be erected by the claimant had no right to hinder or delay him in the proper performance of his work; and for the suspension thereof, ordered by such officers in the supposed interest of the Government, the claimant should recover such damages as are the necessary consequence of the suspension."

The principle, as thus stated, is plainly correct, and is

not denied by the counsel of the United States. His argument is that, on the facts found, other principles of law were involved in the decision. These facts are:

1. That the contract provided for the suspension.
2. That the claim for damages was waived by the resumption of the work.
3. That there was a rescission of the contract.

None of these points were made in the court below, nor are they specifically set out in the assignments of error.

1. That the contract provided for the suspension.

Vide pp. 14, 16, 17 of Appellants' Brief.

It is conceded on behalf of the appellee as matter of law that any such provision in the contract would be fatal to the decree.

But there is no such provision in the contract.

Attention is asked in this connection to these points:

First. The meaning of the contract was a matter of construction for the court; and it has construed the contract as giving no right to the Government to hinder or delay the claimant in the performance of the work. "The suspension was not authorized by the agreement." (Trans., fol. 11.)

Second. There is no express provision of the kind in the agreement.

Third. There is not only no ground for implying one, but such an implication would be in the highest degree unreasonable and unwarranted by the facts. No rational man would make the contract which this one is said by the appellant to be, viz, "a contract made with a view to the possibility of its extending over a series of years and being performed interruptedly." (Appellants' Brief, p. 15.) Such a contract would have been ruinous at any price.

Fourth. The Government has offered no excuse and shown no reason for the delay it caused.

2. That the claim for damages was waived by the resumption of the work.

This action was not brought on the contract, but on an implied *assumpsit* collateral to it.

In the language of the Court of Claims (Transcript, fol. 11) "the suspension was not authorized by the agreement, and was to all intents and purposes an alteration sought by the Government for its own purposes, and for which it is properly and legally liable."

Here are all the legal elements of an implied *assumpsit*—work done or expense incurred by the claimant at the request of the Government outside of the contract.

This case is plainly within the doctrine of the Amoskeag Co. *v.* U. S., 12 W., 592.

Does, then, the subsequent resumption of the work by the claimant bar his recovery on this implied promise?

It is impossible to see, in reason or convenience, any ground for holding that a claimant, by electing to complete his principal contract, must lose his rights under a collateral promise. It may be oftentimes ruinous to rescind the original contract. Especially is this the case in contracts with the Government involving large amounts. Enough appears on the findings in this case to show that such would have been the result to this claimant of a rescission.

In Figh *v.* U. S., 8 C. C., 323, a case precisely like this, the court say: "It is obvious the action is maintainable, for it cannot be assumed that one party to a contract can wrongfully delay its performance without exposing the other" to "losses and injuries for which the law affords redress. To deny its enforcement would be an injustice which no court could afford to perpetrate."

There is nothing in the books denying the right to recover in such a case.

This court has distinctly recognized the right to recover on the collateral promise after the completion of the work under the original contract.

In Clark's case, 6 Wall., 543, the claimant suffered loss by the interference of the Government, completed his contract, and was paid in full under the contract. (*v.* 1, C. C., 257.) He brought his action in the Court of Claims for the loss caused by the interference and delay, and was there defeated. On appeal to this court, the decision below was reversed.

"If the Government permitted him to go on in the effort to complete the contract, it surely had acquired no right to compel him to do it in a manner which necessarily involved him in a great loss."

It was so held in that case, although the interference was after the time limited for the performance of the contract had expired.

In Garrison's case, 7 Wallace, 688, the claimant had been paid under his contract, when he brought his action to recover an additional sum for the rifles already paid for. Judgment in his favor was directed by this court.

In both of these cases recovery was had not only after resumption, but after payment in full under the contract. (*Vide* 1 C. C., 257, and 7 C. C., 79.)

Gibbon's case, 8 Wall., 272, is clearly distinguishable. On the facts there the claimant could not recover.

First. He suffered no damage. The court says: "There is no evidence that he lost anything by this refusal. On the contrary, it appears that oats had risen in the market, so that the presumption is that he was benefited." (P. 273.) The case could have been rested on that ground alone.

Second. In Gibbon's case the act complained of was the unauthorized act of a subordinate agent of the Government. In this case the act was that of the Secretary of War. In the third finding of fact General Ord, the department commander, attributes the delay to orders from Washington; and in the second finding it will be observed that

the resumption was by orders of the Secretary. That officer had full authority to contract for the United States.

Third. In Gibbon's case a rescission of the contract would have been a complete remedy; in this case it would have been ruin to the claimant.

Fourth. In this case the act complained of is in no sense a tort. It was in substance a request for an alteration of the contract by the highest officer of the Government, and the ground of a new implied *assumpsit*. Congress has expressly given jurisdiction of implied promises to the Court of Claims; and to construe such a state of facts as a technical tort would seem to lop off that branch of the court's jurisdiction.

3. That there was a rescission of the contract.

The point seems to be made in the argument, p. 33; that the suspension of the work constitutes a rescission of the contract.

The answer to this is obvious, that the act of the Government could operate a rescission only at the option of the other party to the contract; and everything he did showed that he considered the contract as still subsisting.

So much of the conclusion of law as relates to the question of damages can be best considered under the second assignment.

II. The second assignment of error relates to the basis and principles upon which the amount of damages was fixed, and the method pursued in ascertaining them.

The error here is not assigned as specifically as required by the XXIst Rule. It has therefore to be assumed that all that is said by the court below on the law of damages is meant to be assigned as error.

It is not pointed out in the assignment what the basis and method as distinguished from the principles are, and the latter as including the former will be alone discussed.

The Court of Claims found, as matter of fact, that the claimant suffered damage to the extent of $5,000.

The court makes two references to the voluminous evidence on the point of damages.

It appears from the 3d finding of fact that the Post Quartermaster, who had entire charge of the work from the beginning to the completion thereof, reported to General Ord, the Post Commander, the claimant's losses as amounting to $8,000, and that General Ord approved the report.

In its opinion the court says that in estimating the damages the parties have gone upon the actual expenditures of the contractor to his sub-contractors and workmen.

These references to the evidence are alone sufficient to meet the charge in the brief, (pp. 1 and 2,) that this is a case in which damnification has been assumed without specific proof of the amount of it.

The principles applicable to the question of damages, laid down both in the "conclusions of law" and in the opinion, are so obvious as not to need discussion. They go upon the ground of compensation or payment of the actual damage suffered, and they are sustained fully by the authorities cited on behalf of the appellant.

III. It is assigned as error that the court refused to find that it nowhere appears in the evidence what amount the claimant paid for skilled labor, &c.

If its conclusion of law was correct, the Court of Claims was right in treating this finding as immaterial. It says:

"A contractor in such case is not bound to make out a bill of particulars; and if he were able to make out one, (which in such case he never is,) it would not follow that he should recover the full amount thereof."

The court did in this case exactly what a jury would do; that is, assessed the damages upon a view of all the evidence. It can no more be called upon to itemize its finding than a jury could be to itemize its verdict. In most cases it is practically impossible for either to do so.

The finding refused was not material in determining the *quantum* of damages. The court says that it has reached its conclusion as to the *quantum* without reference

to that item. The appellee might ask a finding on that point with a view to enlarge his damages; but it is not seen how such a finding could subtract anything from the damages.

IV. The first assignment of error is too vague to raise any question of law not raised by the other assignments.

The argument, from the economical bearing of this case, on page 1 of the brief, proceeds obviously upon a misapprehension. The question involved in the present appeal is there stated to be whether or not claimants must prove that they have been damnified and to what amount—a question which is alleged to be frequently arising in the Court of Claims. The appellee is not at all concerned in the decision of that question.

If there had been on the trial no evidence of damage, the proper proceeding of the Government would have been to move a nonsuit or to demur to the evidence, neither of which steps appears by the record to have been taken.

There is besides in the record ample reference to the evidence on the question of damages. The admission of the post quartermaster was enough evidence to go to a jury on. The claimant could not bring up here the whole of the evidence.

It is not too much to say the real question in the case is as to the *quantum* of damages. That is a question of fact, on which the Court of Claims has made its finding, and it is not a question subject to review in this court.

JAMES LOWNDES,
For Appellee.